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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 107

STASIA V. HAYMAN,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

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COMMISSIONER OF INTERNAL REVENUE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the decision of the Tax Court of the United States for the respondent on the statutory and Constitutional issues raised on this appeal.

OPINIONS BELOW

The unreported memorandum opinion of the Tax Court, T.C. Memo. 1968-103, is set forth in Appendix A to this petition. The unreported judgment of the United States Court of Appeals for the District of Columbia Circuit is set forth in Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 5, 1969, without opinion. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Is the $600 personal exemption deduction provision under 26 U.S.C. § 151(b) constitutional?

(2) Is a loss suffered in the sale of a single residential unit of rental property which exceeded taxable income for year of loss entitled to capital loss treatment with unlimited carryover under 26 U.S.C. § 1211 and related sections, or to net operating loss treatment under 26 U.S.C. § 172, and was the Tax Court justified in concluding that the matter of capital loss treatment was not relevant to any issue presented by the pleadings?

(3) Assuming for argument that net operating loss treatment was properly applicable, is sec. 172(d)(3), disallowing the personal exemption deduction for computing net loss, constitutional?

(4) Assuming for argument that net operating loss treatment was properly applicable, is sec. 172(d)(4), as interpreted in Reg. 1.172-3(a)(3)(i) (26 C.F.R., sec. 172-3), defining all wages and salary as income attributable to taxpayer's trade or business for purpose of computing net operating loss, in accord with law, and is the section otherwise constitutional?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) The Fifth, Ninth, and Tenth Amendments to the Constitution of the United States;

(2) Under 26 United States Code, sections 151(b); 167(a)(2); 172(a), (b), (c), (d)(1), (3) and (4); 1211(b); 1221(1) and (2);

(3) Under 26 Code of Federal Regulations, 172-3, regulation 1.172-3(a)(3)(i).

These provisions are set forth in Appendix C to this petition.

STATEMENT OF THE CASE

This case was initiated in the Tax Court after receipt of a 90-day Notice of Deficiency, dated September 6, 1966, in the amount of $171.63 (subsequently paid in October, 1968 on notice of assessment of lien pending appeal), based on the disallowance by the Commissioner of Internal Revenue of taxpayer's nonbusiness itemized deductions for 1964 in computing net operating loss. On January 13, 1966, taxpayer filed an amended Form 1045 on her 1964 return requesting an additional refund of $123.60 based upon her failure to claim the personal exemption deduction, which was never refunded because it was disallowed under section 172(d)(3). Taxpayer was refunded the sum of $285.45 plus interest on the basis of the original Form 1045, which sum included the $171.63 deficiency claimed by respondent.

The property which gave rise to subject loss was the only realty owned by the petitioner, originally purchased as her residence but rented since 1957 when she moved to the Washington area. She had no other business nor income other than rental income from subject property and salary income from various temporary employers in year of loss.

The net operating loss provisions were discovered by petitioner in a government publication purchased after a

futile attempt to obtain assistance in preparing the 1964 return from the Washington office of the Internal Revenue Service, since no one was there found who knew what treatment was properly applicable under the presented circumstances. Subsequently, at a conference in the Regional Counsel's Office of the Internal Revenue Service, petitioner broached the subject of capital loss treatment but was informed that this was precluded in view of the decision of the Tax Court to the contrary in *Stephen J. Hajos,* T. C. Memo. 1964-328, a Virginia case involving a very similar set of facts. It was admitted by the presiding attorney at the conference, however, that had the sale resulted in a gain, in subject case, capital gain treatment would have been applicable.

Petitioner was further informed that had her 1964 income been sufficient to absorb the loss, or had her capital income been sufficient to absorb her nonbusiness itemized deduction, she could have had the benefit of both deductions and still have claimed the loss from the sale of the property in full, but in the absence of such fortuitous circumstances apparently, she would have to lose both deductions to claim a net operating loss since her salary income was considered business income under Revenue regulations and was not subject to setoff by nonbusiness deductions. This explanation forced the grotesque conclusion that petitioner was penalized because either her total income was too low or that she had the wrong kind of income—salary instead of capital—and served to aggravate a long-felt resentment of the discrimination inherent in our present tax laws against the poor, as well as to precipitate this action.

The Tax Court in a Memorandum Opinion filed on May 29, 1968, found that all of the facts were as stipulated but ruled as a matter of law, in favor of the Commissioner on all issues. After determining that the question of capital loss treatment was not in issue, the Court refused to make any findings thereon. The United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the Tax Court on all issues, without opinion.

The jurisdiction of the Tax Court was invoked under 26 U.S.C. § 6213(a).

REASONS FOR GRANTING THE WRIT

This case presents important constitutional questions never before decided by this Court, with no more being asked of this Court than that which is promised over its portals, and that is, "Equal justice under law."

Although based on a small deficiency, the issues in the case presented assume proportions which merit consideration by the highest court of the land as matters of material concern to the national welfare when it is recalled that a very small tax matter precipitated the Boston Tea Party, and that history has demonstrated that grossly inequitable tax laws have a tendency to promote general disrespect for the law and even topple civilizations. That our tax laws are grossly inequitable is hardly disputable when the newspapers report that in 1967 there were 155 citizens with adjusted gross incomes of more than $200,000 and 21 with more than $1 million who paid no tax at all—with legal sanction, whereas petitioner paid a tax of $590 in the same year on an income of $4,550.

(1) On the first issue, a finding by this Court that 26 U.S.C. § 151(b), the $600 personal exemption deduction provision which accords all taxpayers under 65 years of age who are not blind (and their spouse's) an equal and unchanging exemption, is in fact unconstitutional, would provide much needed impetus to passage of legislation which would equalize the disproportionate and unwarranted burden that present income tax laws impose upon the very people who are least able to sustain it—in direct contravention of the ability-to-pay principle in taxation.

Although admittedly, it is not within the power of this Court to legislate, it is not only within its power but it constitutes its duty, under our system of checks and balances, to set aside laws which so clearly violate our Constitution as does the $600 personal exemption deduction

provision. The time has come to seek redress in this Court for tax provisions which to quote Chief Justice Coke, "maketh a net to catch little birds and letteth the great ones go." Present section 151(b) does indeed, "catch little birds" and it is time to let them go.

Notwithstanding the fact that this issue was ancillary to the deficiency which served as the basis of this suit, it should have been separately considered by the Tax Court since it was presented as a separate issue in the pleadings—a fact which was completely disregarded when the Tax Court held, without disclaiming jurisdiction, that irrespective of whether the exemption was $600 or $6000, the petitioner was not entitled to claim it under section 172(d)(3).

It is submitted that the $600 exemption figure applicable to all under 65—to a one-day old infant as well as to the single adult taxpayer who must bear the complete expense of a household himself—constitutes unreasonable and arbitrary classification, as unreasonable as would be a classification that was based on the color of a taxpayer's eyes or the size of his ears.

Additionally, since the income tax is applied even to taxpayers whose income is insufficient to maintain a decent living before the imposition of the tax (as the tax tables amply evidence), the $600 figure, or any figure which is not related to the cost of living and which does not permit a decent standard of living tax-free, works a confiscation on a portion of our citizens that runs into the millions.

Finally, the present figure works a discrimination against a taxpayer with a single exemption (of whom petitioner is one) when compared to a taxpayer claiming two or more exemptions, since the aggregate exemptions available to a taxpayer with a multi-member household are not proportional to the relative costs of maintaining single-member and multi-member households. This denies the single exemption taxpayer the equal protection of law which is implicit in the "due process" clause of the Fifth Amendment.

Section 151(b), therefore, is unconstitutional for constituting unreasonable classification, for confiscating property of the poor taxpayer, and for discriminating against the single taxpayer—all in violation of the "due process" clause of the Fifth Amendment, and of the rights reserved to the people in the Ninth and Tenth Amendments to the United States Constitution.

(2) With respect to the second issue, the properly applicable tax treatment of a loss in a capital asset sale transaction, and the propriety of the Tax Court's refusal to consider the issue on the ground that capital loss treatment was not relevant to any of the issues raised in the pleadings, it is submitted that the Tax Court erred in its conclusion, since petitioner had stated under 5B of her pleadings that,

> "the application of 172(d)(3) to the above mentioned transaction under the circumstances of the petitioner was unconstitutional . . ."

and under 5C(iv),

> "Had the loss here suffered been considered a capital loss, the petitioner would have been entitled under other provisions of the Code to deduct the full loss on an annual basis without the necessity of losing either her personal exemption or the nonbusiness deductions,"

and under her second prayer,

> ". . . that this Court may try the case and find . . . That Sec. 172(d)(4) is unconstitutional as applied to the case at bar."

Had not Internal Revenue Service advised petitioner of its futility, petitioner would have submitted an amended return on the basis of capital loss treatment.

Since the Tax Court had denied capital loss treatment to a transaction practically identical to the one at bar, it is difficult to reconcile its opinion in the *Hajos* case, *supra*, with its statement in this cause that,

> "our refusal to consider this argument of petitioner should not be construed as a finding or conclusion

> on our part that the loss on the sale of petitioner's real property was not a capital loss . . . We have no inclination to preclude petitioner from litigating her right to a capital loss deduction for 1964 and subsequent years to the extent not barred by statutory limitation."

It can only be concluded from the above quotation that had petitioner wanted the issue of capital loss treatment to be considered in a single suit, and it is presumed that the Tax Court does not or should not countenance multiplicity of suit, she should have submitted two returns, on both bases, to have the Tax Court determine which one was properly applicable, notwithstanding the Court's previous determination under a similar set of facts, that capital loss was not applicable—a requirement that would represent a perfect exercise in futility.

Furthermore, it is not possible to reconcile the holding in the *Hajos* case, *supra,* with the interpretation that this Court gave to the word "primarily" with respect to property held primarily for sale to customers in the ordinary course of a taxpayer's trade or business under section 1221(1), in *Malat v. Riddell,* 347 F.2d 23; on certiorari to U.S. Ct. of App., 9th Cir., 383 U.S. 569 (1966). Although the transaction there involved a capital gain instead of a loss, since the section cited defines a capital asset, the interpretation given the word "primarily" to mean "of first importance or principally" would not exclude the transaction at bar from qualifying as a capital asset transaction and entitled to capital loss treatment, since it could hardly be claimed, under the circumstances, that petitioner's property was held primarily for sale in the ordinary course of her trade or business.

In *Union National Bank of Troy v. United States,* 195 F. Supp. 382 (Dist. Ct. N.Y. 1961), where the taxpayer, a bank president, had a declared net income of $80,000 and whose income from inherited rented property in the same year was about $7,900, the Court held that the loss resulting from the sale of the rental property was subject to cap-

ital loss treatment and was not deductible in full in the year of loss as ordinary business loss. The Court there said, and its statement is equally applicable to the case at bar, that:

> "It would crush reason to conclude in view of these facts (comparative income from rentals with net income) that the rental of property was his trade or business." (Parenthetical reference supplied.)

Similarly, and even more in point because the property involved was not inherited property, in *Chicago Title & Trust Co. v. United States,* 209 F.2d 773 (7th Cir. 1954), an executive officer of a clothing firm invested in rental real estate property, managed by real estate firms, and purchases and sales were infrequent. Taxpayer there was held not to be engaged in the business of buying and selling real estate, and losses from sale were to be treated as capital asset losses for the

> "taxpayer was engaged in collecting his rents only incidentally to the protection of his investment in physical assets nor was the Court bound to find him in the business of renting property."

In conclusion, on the second issue, it is submitted that the property here in question qualified as a capital asset within the definition of sec. 1221, was not excluded under either subsec. (1) or (2) thereunder, was depreciable under sec. 167(a)(2) as property held for the production of income, and was, therefore, entitled to capital loss treatment on sale.

(3) With respect to the third issue, and assuming for purpose of argument that net operating loss treatment is here properly applicable, objection to the constitutionality of 26 U.S.C. 172(d)(3), which disallows the personal exemption deduction in computing net operating loss, is based on the ground of violation of equal protection of law which is implicit in the "due process" clause of the Fifth Amendment, and in the rights and powers reserved to the people in the Ninth and Tenth Amendments to the Constitution of the United States.

Conceding that it is within legislative grace to grant certain types of deductions, equal protection would require that taxpayers with business losses should receive the same benefits as those suffering capital losses, for who is to say that capital transactions are more important to the public welfare than business transactions and require more "incentives."? Nevertheless, in computing capital loss carryover, although the personal exemption is disallowed in arriving at the limitation figure, if the taxable income is over $1,000—as it was in the case at bar—the personal exemption can still be applied to reduce the taxable income for the year of loss and the capital loss can be completely absorbed at the rate of $1,000 per year. If the carryback and carryover deduction is to be allowed in the first instance, equal protection requires that both groups of taxpayers—equally worthy citizens—have the same rules apply.

(4) On the fourth and final issue, again assuming for purpose of argument that net operating loss treatment is here properly applicable, which questions the constitutionality of 26 U.S.C. § 172(d)(4), as well as the legality of the Tax Court's interpretation of said provision, with respect to the former, the same constitutional objections for the same reasons advanced above under the third issue, are offered by the petitioner, since there is no disallowance whatsoever of nonbusiness deductions in computing net capital loss for carryover purposes.

With respect to the objection of illegality, it is submitted that definition of all salary income, regardless of source, as business income for purposes of the net operating loss provision in Internal Revenue Regulation 1.172-3(a)(3)(i) (26 C.F.R. 172-3), is not based on the law and defeats legislative intent—at least when business losses are involved (as distinguished from casualty and other nonbusiness losses which have been included under the broadened provisions of section 172 since its original enactment in 1918, when carryback was allowed only for operating losses in business).

Under present 172(d)(4), the excess of nontrade or nonbusiness deductions of the taxpayer over his gross

income from sources other than "such" trade or business, are disallowed in computing the net operating loss. Legislative history has revealed that it has been the continuing intent of Congress to equalize the tax burden for businesses with fluctuating incomes. Since 1954, for example, tax exempt interest is not required as an adjustment to reduce a net operating loss. It is petitioner's contention that tax exempt interest bears the same relationship to a business loss as does salary income not derived from a business suffering a net loss, and that it can be offset by nonbusiness deductions.

In the case at bar, respondent cannot and does not claim that taxpayer's salary income was derived from the business (if such it were) of renting real property. Consequently, petitioner's salary income should not be considered business income since it is not considered as such for purposes of business expense deductions, such as costs incurred for transportation to and from place of employment. Particularly is this true since Congress has seen fit to define salary income as *nonbusiness* income for the purpose of claiming business deductions, but has not seen fit to define salary income as business income anywhere in the Internal Revenue Code.

It is, therefore, submitted that the Tax Court erred in its reliance on said regulation and should be reversed on this issue since its conclusion is not in accord with law or with legislative intent, and regulations do not provide the source of the law.

Further, in the matter of case authority on this issue, all of the cases on which respondent has relied in the Tax Court and on appeal, are based on the decision in *Lagreide, Anders I.*, 23 T.C. 508 (1954). It is submitted that the minority opinion on that case, prepared by Justice J. Murdock, with four other justices concurring, is the correct expression of the law and of legislative intent. The opinion, in substantial part, states:

> "The principal question involved herein, a narrow one, was well settled by our decision in *Joe B.*

Luton, 18 T.C. 1153 (1953), recently acquiesced in, and we should not vacillate. Anders sustained a net loss in the operation of XL Company, a sole proprietorship, in 1949. The net operating loss deduction claimed for 1947 stems from the 1949 net operating loss. The majority holds that there can be net operating loss deduction for 1947 only to the extent that all of the business operations of Anders and his wife in 1949 resulted in a net operating loss, that is, there must be combined with the XL business any other business which either spouse conducted and particularly the two alleged businesses which the wife is held to have conducted. *The only authorities cited for this conclusion are provisions of the regulations.* Those same provisions were quoted in *James H. Cunningham*, 20 T.C. 65 with the thought that they would not support the present holding. * * * The salary of the Wife in that case was derived, however, from the Husband's business and was held to be income of the spouse's *from that particular business.* We said further:

> '*If the salary of the Wife had been from some other source*, the cases cited by the petitioner would be in point . . .'

"The cases to which that last sentence refers were *Hughes v. Commissioner*, 38 F.2d 755, and *Lawrence J. Montgomery*, 17 B.T.A. 1308, both of which dealt with somewhat similar language contained in section 204(a) of the Revenue Act of 1921. *They have not been distinguished in the majority opinion.* * * * The *Luton* case held, I think properly, that salary of the petitioner from a business not connected with that in which the operating loss occurred should be treated as *nonbusiness income first to be offset by nonbusiness losses* under section 122(d)(5) (predecessor section of 172(d)(4)) and only the excess used to reduce the net operating loss being computed. The use of the word 'such' in section 122(d)(5) (also retained in 172(d)(4)) supports that result. *A study of the legislative history of the net operating loss carryback provisions* and considerations of the results

of applying the one solution or the other to various sets of possible circumstances also *convince me that the present result was not intended by Congress.*" (on 513-4; all emphasis and parenthetical references supplied.)

In final summary on this issue, which forms the basis of the deficiency claimed by respondent, petitioner submits that to effectuate Congress's expressed intent over the years to "ameliorate" a business loss by constantly removing modifications that had served to reduce the loss carryback or carryover, salary income is business income within the meaning of section 172(d)(4) only when it is derived from a business owned by the taxpayer and paid to the taxpayer. Furthermore, since salary income has never been defined in the Revenue Code as business income and it has not been deemed necessary to clothe it with the attribute of other business income to be subject to offset by business expense, there is no valid reason to impute an intent on the part of Congress to consider it as such in a provision concerned primarily with losses.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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Petitioner

APPENDIX A

TAX COURT OF THE UNITED STATES

STASIA V. HAYMAN, Petitioner — T.C. Memo. 1968-103

v. — Docket No. 6365-66

COMMISSIONER OF INTERNAL REVENUE, Respondent

[Filed: May 29, 1968]

Stasia V. Hayman, pro se.

Robert E. Garfield, for the respondent.

MEMORANDUM OPINION

KERN, *Judge:* Respondent determined a deficiency in petitioner's income tax liability for 1961 in the amount of $171.63. This deficiency resulted from respondent's determination that petitioner was not entitled to deductions of $810.96 in computing her net operating loss for 1964 to be in the sum of $1,312.93 and accordingly that the "net operating loss carryback allowable" in the taxable year 1961 should be reduced from $1,312.93 to $501.97. The statement attached to respondent's notice of deficiency contained the following sentence:

> The issue raised in your protest requesting that the net operating loss deduction be increased by the personal exemption of $600.00 has been given careful consideration and it has been determined that the deduction is not allowable pursuant to section 172(d)(3) of the Internal Revenue Code.

The petition alleges error on the part of respondent as follows:

> A. The disallowance by the respondent of the personal exemption of $600 (Sec. 172(d)(3)) on the 1964 return in computing net operating loss.

B. The disallowance by the respondent of the nonbusiness deductions for 1964 in computing net operating loss (Sec. 172(d)(4)).

All of the facts herein have been stipulated by the parties. We find the facts to be as stipulated and incorporate herein by this reference the stipulation and the exhibits attached thereto.

Petitioner resides in Washington, D.C., and filed her income tax returns for the years involved herein with the district director of internal revenue at Baltimore, Maryland.

In her return for 1964, petitioner stated her occupation as "Legal secretary" and reported the receipt of "Wages, salaries, tips, etc." in the amount of $2,819. In the same return she reported the receipt of rental income for 10 months of that year at a loss figure of $85.54 resulting from the receipt of gross rentals from a house in Illinois in the sum of $1,045 and the deduction therefrom of $461.19 as repairs and $669.35 as "Other expenses." This property was reported in this return as having been acquired by petitioner in 1954 and as having been sold by her on November 3, 1964, at a loss of $3,235.43. In addition to petitioner's net loss from rentals of $85.54 and loss on the sale of the rental property of $3,235.43, petitioner claimed itemized nonbusiness deductions of $810.96. As a result, petitioner's tax return showed a minus figure for taxable income of $1,312.93 ($2,819.00 less the sum of $3,235.43, $85.54, and $810.96).

On April 7, 1965, the district director in Baltimore, Maryland, received from petitioner a Form 1045, Application for Tentative Carryback Adjustment, showing a decrease in 1961 tax of $285.43 as a result of the carryback of a claimed $1,312.93 net operating loss for 1964. The total amount claimed of $285.43 was refunded to petitioner on May 10, 1965.

Subsequent to the refund, the district director's office examined the petitioner's 1964 return and determined that the petitioner erroneously computed her claimed net oper-

ating loss of $1,312.93 by reason of her failing to eliminate the nonbusiness itemized deductions of $810.96. This adjustment results in the proposed deficiency of $171.63.

In a letter addressed to the district director of internal revenue in Baltimore, Maryland, dated January 13, 1966, petitioner claimed that the 1964 net operating loss carryback to 1961 should be increased by her $600 personal exemption which she failed to include in her original computation.

Copies of petitioner's 1961 return, 1964 return, Application for Tentative Carryback Adjustment (Form 1045) and letter claiming an increase in the 1964 net operating loss carryback to 1961 were introduced into the record as exhibits attached to the stipulation.

In her return for 1961 petitioner stated her occupation as "Teacher" and reported the receipt of "Wages, salaries, tips, etc." as follows:

Prince Georges County Board of Education, Upper Marlboro, Md.	$3,080.00
Kelly Girl Service, Inc., Washington, D.C.	1,412.06
Government of the District of Columbia, Washington, D.C.	137.60

In the same return she reported rental income at a loss figure of $377.67 resulting from the receipt of gross rentals from a house in Hinsdale, Illinois, in the sum of $1,125 and the deduction therefrom of $580.16 on account of depreciation and $922.51 on account of "Other expenses."

OPINION

The question presented for our decision by the pleadings in this case concerns the correct amount of the operating loss which petitioner is entitled to carry back from 1964 to 1961. Specifically, should the amount of this net operating loss carryback be $1,312.93 as originally computed and

claimed by peititioner on April 7, 1965, or $1,912.93 representing the amount originally claimed increased by petitioner's $600 personal exemption which she failed to include in her original computation, or $501.97 as determined by respondent because of his elimination of nonbusiness deductions from the deductions used by petitioner in her computation of the net operating loss carryback.

A net operating loss deductible under section 172(a), I.R.C. 1954, which can be carried back from 1964 to 1961 pursuant to section 172(b)(1)(A)(i) is defined by section 172(c) to be "the excess of the deductions allowed by this chapter over the gross income" with the proviso that "such excess shall be computed with the modifications specified in subsection (d)." Subsection (d)(3) provides as follows:

> (3) * * * No deduction shall be allowed under section 151 (relating to personal exemptions). No deduction in lieu of any such deduction shall be allowed.

Subsection (d)(4) provides in pertinent part as follows:

> (4) * * * In the case of a taxpayer other than a corporation, the deductions allowable by this chapter which are not attributable to a taxpayer's trade or business shall be allowed only to the extent of the amount of the gross income not derived from such trade or business. For purposes of the preceding sentence—
>
> (A) any gain or loss from the sale or other disposition of—
>
> (i) property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or
>
> (ii) real property used in the trade or business,
>
> shall be treated as attributable to the trade or business; * * *.

As we have said, one of the allegations of error made in the petition is that respondent erred in the "disallowance

* * * of the nonbusiness deductions for 1964 in computing net operating loss (Sec. 172(d)(4))." With regard to this allegation of error petitioner makes two arguments.

The first is to the effect that respondent has incorrectly interpreted section 172(d)(4) in that he has followed the interpretation of section 172(d)(4) which was made by the majority of this court in *Anders I. Lagreide*, 23 T.C. 508, instead of the interpretation made by the dissenting opinion published in that case under which latter interpretation nonbusiness deductions could be made from a taxpayer's salary income in computing a net operating loss deduction so long as the salary was "from a business not connected with that in which the operating loss occurred," *Lagreide, supra*, at 514. In connection with this argument petitioner cites *Joe B. Luton*, 18 T.C. 1153, and *James H. Cunningham*, 20 T.C. 65, both of which were cited and relied upon by Judge Murdock in his dissenting opinion in *Lagreide*.

The majority opinion in *Lagreide* distinguished *Cunningham* and overruled *Luton*. In *Godfrey M. Weinstein*, 29 T.C. 142, we specifically re-affirmed our holding in *Lagreide* and held that nonbusiness deductions could not be deducted from salaries in computing net operating losses. We are not disposed to reach a different result in this case which would entail the overruling of both the *Lagreide* and *Weinstein* cases.

Petitioner also argues in support of her proposition that respondent erred in disallowing nonbusiness deductions in computing her net operating loss for 1964, that subsection 172(d)(4) is unconstitutional and therefore is inapplicable to the facts of this case. This argument appears to be based on petitioner's contention that the application of subsection 172(d)(4) to the computation of a net operating loss would result in unreasonable discrimination against a taxpayer having a net operating loss as compared with one having a capital loss and against poorer taxpayers who work for salaries and wages and have no income from investments as compared with taxpayers who have nonbusiness income from investments in addition to their business income.

Petitioner also contends that subsection 172(d)(3) is unconstitutional for much the same reasons.

It is axiomatic that deductions are matters of legislative grace. Congress has seen fit to permit taxpayers to deduct in certain taxable years net operating losses sustained in certain other taxable years. At the same time Congress has seen fit to prescribe that in the computation of an individual's net operating loss no deduction from gross income should be made on account of a personal exemption and that deductions not attributable to a taxpayer's trade or business should be allowed only to the extent of gross income not derived from trade or business.

In *General Securities Corporation*, 23 B.T.A. 130 at 133, we made the following statement:

> We know of no constitutional provision which requires Congress to permit actual losses sustained in one year to be deducted in computing net income of any other year. Neither do we know of any provision which prohibits Congress from allowing such deduction. Congress, therefore, had the right, in exercising its discretion as to whether any loss sustained in one year should be allowed as a deduction in computing gross income of any other year, to prescribe the method of computing such loss.

See also *Otto Keusch*, 23 B.T.A. 216; *Brushaber v. Union Pac. R. R.*, 240 U.S. 1.

We are unable to see anything in the statutory scheme relating to the computation of a net operating loss so capricious in classification, so arbitrary or producing such gross and patent inequality as to justify a conclusion on our part that subsections 172(d)(3) and 172(d)(4) are unconstitutional as applied to the facts of this case. See *Brushaber v. Union Pac. R. R.*, *supra*, at 24 and 25. In our opinion petitioner's constitutional argument, though vigorously asserted and at times eloquently expressed rests "upon the mistaken theory that * * * where a tax levied is believed by one who resists its enforcement to be wanting in wisdom and to operate injustice, from that fact in the nature of things there

arises a want of due process of law and a resulting authority in the judiciary to exceed its powers and correct what is assumed to be mistaken or unwise exertions by the legislative authority of its lawful powers, * * *." *Brushaber v. Union Pac. R. R., supra,* at 26.

Petitioner devotes a considerable part of her argument on brief to her contention that section 151(b), I.R.C. 1954, which grants a personal exemption in the amount of $600 is unconstitutional. In connection with this argument petitioner points out that "Since 1948, the personal exemption deduction for any single taxpayer or dependent has been $600; this figure applies to a taxpayer whether his income is $900 or $9 million; it applies to a working adult who maintains a household and to a one day old infant who is not yet required to pay his way in the world; it applies in 1967 as well as in 1948, despite a rise in the cost of living which according to the Commodity Price Index (Attachment # 2) has risen at least 37% since 1948, and probably closer to 50%, in certain areas such as medical expense."

In view of the fact that we have concluded as stated above that the prohibition continued in subsection 172(d)(3) against the deduction of *any* personal exemption in the computation of a net operating loss is valid and constitutional, the question of the proper constitutional amount of such an exemption becomes moot on the facts of this case. Regardless of whether it should be $600 or $6,000 it is not deductible in computing petitioner's net operating loss.

In her brief petitioner attempts to raise an alternative contention to the effect that the rental property sold by her in 1964 was not property used by her in a trade or business within the meaning of any provision of section 172 and therefore a loss resulting from its sale in 1964 would not give rise to a net operating loss which could be carried back to 1961 but rather to a capital loss which could be carried over to years subsequent to 1964. Petitioner now argues that "* * * after diligently studying the case law and the Internal Revenue Code on the subject, she is convinced

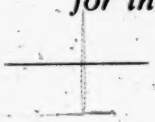
that both these sources support a finding that the transaction herein [i.e., the sale of petitioner's rental property at a loss] is entitled to capital loss treatment with unlimited carryover under sections 1221, 1211 and 1212 of the Code," that "such a finding would * * * render mute [sic] the issues of constitutionality * * *," and that petitioner has not suffered a loss "attributable to a trade or business, but rather to the disposition of a capital asset * * *."

The difficulty with this argument is that it is not pertinent to the issues presented by the pleadings which relate to the proper computation of a net operating loss claimed by petitioner for 1964 which she can carry back to 1961. Respondent has allowed the net operating loss carryback claimed with a consequent reduction in petitioner's taxes for 1961 but not in amounts as computed by petitioner, and accordingly a deficiency has been determined for 1961 which is here at issue. Petitioner's argument to the effect that the loss resulting from the sale of her rental property in 1964 gave rise to a capital loss which could be carried forward to succeeding years instead of giving rise to a net operating loss which could be carried back to 1961 is not relevant to any issue presented by the pleadings and cannot be considered by us. See *Camp Wolters Enterprises, Inc.*, 22 T.C. 737, 755, aff'd, 230 F.2d 555, cert. den. 352 U.S. 826. See also *James F. Curtis*, 3 T.C. 648, 651.

However, we wish to point out that our refusal to consider this argument of petitioner should not be construed as a finding or conclusion on our part that the loss on the sale of petitioner's real property was not a capital loss. We have merely assumed in our consideration of this case what was assumed by the parties in their actions and pleadings prior to and at the time of trial, i.e., that the loss resulting from sale of petitioner's rental property in 1964 can be deducted from petitioner's income from "Salary, wages, tips, etc." in computing the net operating loss carryback available to her in 1961. We have no inclination to preclude petitioner from litigating her right to a capital loss deduc-

tion for 1964 and subsequent years to the extent not barred by statutory limitation.

Decision will be entered for the respondent.



APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,306

September Term, 1968.
Tax Court No. 6365-66.

Stasia V. Hayman,
Appellant,

v.

Commissioner, Internal Revenue

Appeal from the Tax Court of the United States.

[Filed: March 5, 1969]

Before: Burger, Wright, and Tamm, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the United States Tax Court, and was argued by appellant, pro se, and by counsel for appellee.

It appearing that the decision of the Tax Court correctly disposes of the statutory issues raised by appellant,

And it further appearing that the Constitutional issues raised on this appeal are without merit, it is

ORDERED AND ADJUDGED by this Court that the decision of the Tax Court be, and it is hereby, affirmed.

Per Curiam

For the Court:

Nathan J. Paulson, Clerk

Dated: March 5, 1969.

APPENDIX C

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person . . . nor be deprived of life, liberty, or property, without due process of law . . ."

The Ninth Amendment to the United States Constitution provides:

> "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."

The Tenth Amendment to the United States Constitusion provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

26 U.S.C. § 151(b)* provides in pertinent part:

> "TAXPAYER AND SPOUSE—An exemption of $600 for the taxpayer; . . ."

26 U.S.C. § 167(a)(2) provides in pertinent part:

> "There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)
>
> (2) of property held for the production of income . . ."

26 U.S.C. § 172 provides in pertinent part:

> "(a) There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term 'net operat-

*All Title 26 citations are from Internal Revenue Code of 1954.

ing loss deduction' means the deduction allowed by this subsection.

(b) NET OPERATING LOSS CARRYBACKS AND CARRYOVERS.–

(1) YEARS TO WHICH LOSS MAY BE CARRIED.–

(A)(i) Except as provided in clause (ii) and in subparagraph (d), a net operating loss for any taxable year ending after December 31, 1957, shall be a net operating loss carryback to each of the 3 taxable years preceding the taxable year of such loss.

* * *

(c) NET OPERATING LOSS DEFINED.–For purposes of this section, the term 'net operating loss' means (for any taxable year ending after December 31, 1953) the excess of the deductions allowed by this chapter over the gross income. Such excess shall be computed with the modifications specified in subsection (d).

(d) MODIFICATIONS.–The modifications referred to in this section are as follows:

(1) NET OPERATING LOSS DEDUCTION.– No net operating loss deduction shall be allowed.

* * *

(3) DEDUCTION FOR PERSONAL EXEMPTIONS.– No deduction shall be allowed under section 151 (relating to personal exemptions). No deduction in lieu of any such deduction shall be allowed.

(4) NONBUSINESS DEDUCTIONS OF TAXPAYERS OTHER THAN CORPORATIONS.– In the case of a taxpayer other than a corporation, the deductions allowable by this chapter which are not attributable to a taxpayer's trade or business shall be allowed only to the extent of the amount of the gross income not derived from such trade or business. For purposes of the preceding sentence–

(A) any gain or loss from the sale or other disposition of–

(i) property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or

(ii) real property used in the trade or business,

shall be treated as attributable to the trade or business;" * * *

26 U.S.C. § 1211 provides in pertinent part:

"LIMIT ON CAPITAL LOSSES.–(b) In the case of a taxpayer other than a corporation, losses from sale or exchanges of capital assets shall be allowed only to the extent of the gains from such sales or exchanges, plus the taxable income of the taxpayer or $1,000, whichever is smaller. For purposes of this subsection, taxable income shall be computed without regard to gains or losses from sales or exchanges of capital assets and without regard to the deductions provided in section 151 or any deductions in lieu thereof."* * *

26 U.S.C. § 1221 provides in pertinent part:

"CAPITAL ASSET DEFINED.–For purposes of this subtitle, the term 'capital asset' means property held by the taxpayer (whether or not connected with his trade or business) but does not include–

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(2) property used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or real property used in his trade or business." * * *

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R., Sec. 1.172-3) provide in pertinent part:

> "1.172-3(a)(3)(i) *Nonbusiness deductions*—(i) *Ordinary deductions.* Ordinary nonbusiness deductions shall be taken into account without regard to the amount of business deductions and shall be allowed in full to the extent, but not in excess, of that amount which is the sum of the ordinary nonbusiness gross income and the excess of nonbusiness capital gains over nonbusiness capital losses. * * * For purposes of section 172, nonbusiness deductions * * * are those deductions * * * which are not attributable to, or derived from, a taxpayer's trade or business. Wages and salary constitute income attributable to the taxpayer's trade or business for such purposes."

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1386

STASIA V. HAYMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. B. 1)[1] has not yet been reported. The memorandum opinion of the Tax Court (Pet. App. A. 1 - A. 9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1969 (Pet. App. B. 1). The petition for a writ of certiorari was filed on May 12, 1969. The jurisdiction for this Court is invoked under 28 U.S.C. 1254(1).

[1] The symbol "Pet. App." refers to the appendix to petitioner's petition filed in this Court.

QUESTION PRESENTED

Whether Sections 172(d)(3) and 172(d)(4) of the Internal Revenue Code of 1954, which prohibit deductions for personal exemptions and nonbusiness deductions in computing losses that may be carried back or carried over to other taxable years, are constitutional.

STATUTES AND OTHER AUTHORITIES INVOLVED

Section 172 of the Internal Revenue Code of 1954 is set forth in the Appendix, *infra*, pp. 7-8.

STATEMENT

Petitioner, on April 11, 1965, filed with the Commissioner of Internal Revenue an "Application for Tentative Carryback Adjustment" (Ex. 2 B to Stip.),[2] claiming a reduction in her 1961 federal income tax of $285.43 (Ex. 2 B to Stip., p. 1) on the ground that her income tax return for 1964 disclosed that she had had a net loss of $1,312.93. Petitioner arrived at this figure by deducting the following amounts from the $2,819 in wages she received as a secretary during 1964: a $85.54 loss from the operation of rental property; a $3,235.43 loss upon the sale of that property; and itemized nonbusiness deductions of $810.96 (Pet. App. A. 2).

In accordance with his established practice and prior to audit, the Commissioner mailed to her the requested refund of $285.43. Then, on January 13,

[2] The exhibits were separately bound, and filed in the court below as part of the record.

1966, petitioner by letter claimed an additional deduction increasing her "net loss" by the amount of a personal exemption of $600, which she had failed to claim on her 1964 return (Pet. App. A. 3).

Upon audit, the Commissioner limited the net operating loss carryback deduction to $501.97, thus determining that neither the itemized nonbusiness deductions nor the personal exemption could be used to enhance the net operating loss carryback deduction allowed under Section 172 of the 1954 Code. (Ex. A to Pet., pp. 1-2). The result was an income tax deficiency against petitioner in the amount of $171.63 (Pet. App. A. 3). Upon a petition for a redetermination, the Tax Court sustained the Commissioner's determination and the Court of Appeals for the District of Columbia Circuit affirmed (Pet. App. B. 1).

ARGUMENT

The decision below is correct, and there is no conflict of decisions or any other ground for further review.

1. Sections 172(a) and 172(b) of the Internal Revenue Code of 1954 allow a three year carryback of a taxpayer's "net operating loss." Section 172(c) defines the net operating loss as "the excess of the deductions allowed by this chapter over the gross income * * * with the modifications specified in subsection (d)." Two of the modifications of Section 172(d) apply here. They are Sections 172(d)(3) and 172(d)(4):

(3) *Deduction for personal exemptions.*—No deduction shall be allowed under section 151 (relating to personal exemptions). No deduction in lieu of any such deduction shall be allowed.

(4) *Nonbusiness deductions of taxpayers other than corporations.*—In the case of a taxpayer other than a corporation, the deductions allowable by this chapter which are not attributable to a taxpayer's trade or business shall be allowed only to the extent of the amount of the gross income not derived from such trade or business. For purposes of the preceding sentence—

(A) any gain or loss from the sale or other disposition of—

(i) property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or

(ii) real property used in the trade or business, shall be treated as attributable to the trade or business;

* * * *

Thus the statute expressly required the Commissioner and the courts to rule that petitioner's $600 personal exemption and her nonbusiness itemized deductions of $810.96 could not be used to enhance the amount of the carryback.

2. There is no merit to petitioner's attack on the constitutionality of Sections 172(d)(3) and (4). Of course, unconstitutionality of the $600 exemption could hardly be a reason for allowing petitioner to claim it to enlarge her carryback. In no event does

the exemption violate any constitutional provisions. *Crowe* v. *Commissioner*, 396 F.2d 766, 767 (C.A. 8); cf. *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1. The purpose and effect of Section 172(d)(4)—to limit loss carrybacks and carryovers to business losses[3]—is well within the legislative power. *See United States* v. *Olympic Radio and Television*, 349 U.S. 232, 235-236.

3. Section 172(d)(4) expressly provides that "real property used in the trade or business, shall be treated as attributable to the trade or business" in arriving at a net operating loss carryback. Thus the courts below properly rejected petitioner's contention that the loss on the sale of her rental property should not be treated as attributable to her trade or business.[4] Even if there were any merit to petitioner's contention that her loss from the sale of the rental property is to be treated as a capital loss, it would not affect the year in issue here and such issue was not raised in the pleadings filed in the Tax Court.[5]

---

[3] See S. Rep. No. 1622, 83d Cong., 2d Sess. 31-32, 211-213.

[4] See *Alvary* v. *United States*, 302 F. 2d 790, 796 (C.A. 2); *Reiner* v. *United States*, 222 F.2d 770, 772-773 (C.A. 7).

[5] Nor is there merit to petitioner's contention that her wages are not to be treated as income attributed to her trade or business in arriving at her operating loss carryback. See Section 1.172-3(a)(3) of Treasury Regulations on Income Tax (1954 Code); *Folker* v. *Johnson*, 230 F.2d 906, 907 (C.A. 2); *Overly* v. *Commissioner*, 243 F.2d 576 (C.A. 3); *Batzell* v. *Commissioner*, 266 F.2d 371, 372 (C.A. 4); *Roberts* v. *Commissioner*, 258 F.2d 634, 636-637, 640 (C.A. 5); *Pierce* v. *Commissioner*, 254 F.2d 885, 887-888 (C.A. 9); *Weinstein* v. *Commissioner*, 29 T.C. 142, 146; *Swisher* v. *Commissioner*, 33 T.C. 506, 509.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

CROMBIE J. D. GARRETT,
BENJAMIN M. PARKER,
Attorneys.

JUNE 1969.

APPENDIX

Internal Revenue Code of 1954:

SEC. 172. NET OPERATING LOSS DEDUCTION.

(a) *Deduction Allowed.*—There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term "net operating loss deduction" means the deduction allowed by this subsection.

(b) [as amended by Sec. 317(b), Trade Expansion Act of 1962, P. L. 87-794, 76 Stat. 872, 889] *Net Operating Loss Carrybacks and Carryovers.*—

(1) *Years to which loss may be carried.*—

(A) (i) Except as provided in clause (ii), a net operating loss for any taxable year ending after December 31, 1957, shall be a net operating loss carryback to each of the 3 taxable years preceding the taxable year of such loss.

* * * *

(c) *Net Operating Loss Defined.*—For purposes of this section, the term "net operating loss" means (for any taxable year ending after December 31, 1953) the excess of the deductions allowed by this chapter over the gross income. Such excess shall be computed with the modifications specified in subsection (d).

(d) *Modifications.*—The modifications referred to in this section are as follows:

* * * *

(3) *Deduction for personal exemptions.*—No deduction shall be allowed under section 151 (relating to personal exemptions). No deduction in lieu of any such deduction shall be allowed.

(4) *Nonbusiness deductions of taxpayers other than corporations.*—In the case of a taxpayer other than a corporation, the deductions allowable by this chapter which are not attributable to a taxpayer's trade or business shall be allowed only to the extent of the amount of the gross income not derived from such trade or business. For purposes of the preceding sentence—

(A) any gain or loss from the sale or other disposition of—

(i) property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or

(ii) real property used in the trade or business, shall be treated as attributable to the trade or business;

* * * *

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